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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1392

COUNTY BOARD OF EDUCATION OF
FAYETTE COUNTY, TENNESSEE,

Petitioner,

—VS.—

MRS. MABLE C. WALKER, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

Since the filing of the Petition for a Writ of Certiorari, the opinion of the United States Court of Appeals for the Sixth Circuit and the dissenting opinion of Judge Weick have been reported at 455 F.2d 199, 204.

Statement

Respondents herein are black teachers formerly employed by the County Board of Education of Fayette County, Tennessee, who intervened in a lawsuit to desegregate the county's public schools after the Board failed to rehire them following implementation of a desegregation plan ordered by a United States District Court. Seven of the thirteen respondents had taught in the county public

schools for periods between 18 and 35 years, prior to 1970, and had been treated by the Fayette County school authorities as having "tenure."[1] Each respondent was not rehired for the 1970-71 school year following the Superintendent's recommendation and action thereon by the school board (App. 123a, 388a), which had never itself adopted any criteria to be applied in case of the sort of system-wide faculty reduction occasioned after the desegregation plan was implemented (App. 113a, 350a).

The Board sets out (Petition, pp. 4-5) the "factors" that it claims were considered in determining which faculty members would be terminated.[2] However, the evidence

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[1] Tennessee law provides that public school teachers who have college degrees attain full tenure status upon being offered a contract by a school system for a fourth consecutive year. Teachers without degrees who have worked four years are afforded "limited tenure" so long as they have taken twelve credits toward a degree within the preceding three years (App. 119a [citations to appendix in 6th Cir. No. 71-1206 are given in this form throughout this Brief]). Prior to 1969, the Fayette County school system had misapplied the state teacher tenure law by considering all teachers who had been offered contracts for four years or more to be tenured (App. 207a-08a, 327a, 349a). For this reason, those respondents who had served as teachers in the Fayette County public school system for over a decade (App. 204a-60a) were under the impression, prior to their termination, that they had tenure (App. 314a). They had never been notified by the Superintendent of Schools that they were actually not tenured nor that they could become tenured by complying with the educational requirements of the law (App. 350a). See Appendix to Petition [Ptn. App.] A-20; A-14, 455 F.2d at 201.

[2] The 1969 district court order directing implementation of a desegregation plan had also required assignment of faculty members to each school on a basis substantially in accord with the system-wide black-to-white faculty ratio. See *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970); *Nesbit* v. *Statesville City Bd. of Educ.*, 318 F.2d 1040 (4th Cir. 1969); *Swann* v.

revealed, and the district court found, that no objective comparison of these or any other characteristics among Fayette County teachers was ever made:

> [T]he plaintiffs should have been judged by definite objective standards with all other non-tenure teachers within the system. The Court finds that there was not a comparison as contemplated. This is particularly so in the cases in which the Board's reliance was based primarily upon the comments of the principal who was certainly not familiar with all of the non-tenure teachers in the system. (Ptn. App. A-24).

The Superintendent did not consider all non-tenure teachers in arriving at his recommendations for dismissal but only those about whom, some time in the past, some kind of complaint had been made (whether or not that complaint was considered serious enough to warrant dismissal at the time it was lodged), and those he considered "poor teachers" (App. 177a-178a).

Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 19-20 (1971). Prior to the start of desegregation, 60% of all Fayette County teachers were black; in selecting those to be dismissed because of the overall reduction in force, the Superintendent and board regarded this ratio as immutable and sought to maintain it by insuring that at least 60% of the terminated teachers were black (App. 124a, 219a, 515a). *Compare Carter* v. *West Feliciana Parish School Bd.*, 432 F.2d 875, 879 (5th Cir. 1970). Because only 42% of the non-tenure teachers in the county were black, this initial selection criterion burdened black teachers far more harshly than whites. Of course, it is impossible to know whether black teachers or white teachers were ultimately favored in the selection of those to be terminated since, as the District Court and the Court of Appeals found, no process of objective comparison was ever undertaken and one cannot contrast the teachers actually terminated with those who should, on the basis of their merit, have been released. In any event, it seems likely that, but for this misconstruction of the court's decree, all of the terminated teachers would have been black.

Even this limited sample was not evaluated in a systematic and objective manner. For one thing, the Superintendent did not have before him the same kinds of information about all of the teachers. Rating sheets requested by him in September, 1969 (App. 148a) had not been prepared for all teachers (App. 234a). He made no attempt to assess the reports or past complaints he had from various principals in light of the principals' differing qualifications (App. 179a) nor to investigate the substance or significance of the complaints, nor to permit the teachers to explain or rebut such complaints; thus, he characterized the reasons for dismissal of some of the respondents as "not very substantial" in his trial testimony (App. 211a).

Finally, when the Superintendent made his selection, he was unable to recall how each non-tenure teacher had been rated by his principal or supervisor (App. 183a); and personnel files or rating sheets were not brought before the school board (App. 152a). The district court concluded:

> The Court further finds that the standards employed by the defendants were not "definite objective standards" contemplated. The variety of the criteria used was not objective but permitted the Superintendent and the Board to apply, in secret, standards susceptible to the Superintendent's and the Board's whim. (Ptn. App. A-24)[3]

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[3] As the District Court stated from the bench:

> [I]t is very apparent that the whole system of choosing who was not to be rehired or dismissed centered on this man's [Superintendent Bagwell's] mind or state of mind. He was the whole objective standard, according to the defendants. (App. 265a-266a).

The evidence further established that after Respondents' employment had been terminated but prior to the beginning of the 1970-71 school year, unexpected resignations created vacancies for teachers in Fayette County, many in the various fields of Respondents' state certification (A. 142a, 211a, 217a). Yet the Board made no effort to reemploy Respondents, whose service (up until the process of desegregation resulted in an overall faculty reduction) had been sufficiently satisfactory to result in contract renewal; instead, teachers new to the school system were sought and hired (A. 142a).

Following presentation of evidence by the Board with respect to the actual selection process and the information available to the Board and Superintendent at that time—and cross-examination of the Superintendent and other Board employees on behalf of Respondents—the District Court ruled that it would accept further evidence on that issue alone but would not permit the introduction of testimony about Respondents' qualifications which had not been available to the Superintendent or the Board at the time the decision to terminate Respondents' employment was made.

The Board maintained unsucessfully in the District Court and the Court of Appeals that its selection process had been impartial. The District Court ruled against these contentions—but not, as the Board suggests (Ptn., p. 6), because competency and teaching ability are impermissible criteria of selection. Rather, the Court found that the Board had *not* objectively compared its entire faculty on the basis of such criteria, both because comparisons were made only among a selective sample and because the method of comparison depended upon the unchecked discretion of the Superintendent.

The District Court also held, with respect to those of the Respondents who had long periods of service and whose terminations were sought to be justified by the Superintendent on the basis of incidents or complaints which had come to his attention in prior years, that the due process clause of the Fourteenth Amendment prohibited their discharge without any opportunity to explain or rebut such charges and complaints. Finally, in order to prevent a recurrence of the events which led to this lawsuit, the District Court ordered future faculty reductions occasioned by desegregation to be governed by comparison of state certification, degrees and college work, and experience alone; other dismissals based on specific incidents or complaints unrelated to these criteria, the court held, would have to be processed in accordance with Tennessee law:

> Such matters should be treated as dismissals for cause, the reasons should be given to the teacher, and the teacher should be notified that he, or she, is entitled to a hearing on the accusations against her. (Ptn. App. A-25).

The Court of Appeals affirmed, Judge Weick dissenting. The majority agreed with the District Court's finding that Respondents had been discharged in a racially discriminatory manner, and not on the basis of an adequate or fair comparison of their abilities and qualifications with other teachers'. The majority of the Court of Appeals also held, without mentioning the due process clause, that Respondents were constitutionally protected against racially discriminatory discharge from their employment; and finally, the majority below agreed with the District Court that the Seventh Amendment did not guarantee the Board a jury trial in this action for redress of constitutional rights pursuant to 42 U.S.C. §1983.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Decision Below Does Not Rest Upon Any Notion Of Procedural Due Process Rights Guaranteed Public Schoolteachers But Upon Findings Of Racial Discrimination.

The Board miscasts the holding of the Court of Appeals when it suggests that this Court should review this case to consider whether or not the due process clause of the Fourteenth Amendment guarantees public school teachers notice of charges and a hearing before a school board may decide not to rehire them.

Contrary to the assertions of the Petition, the Respondents were ordered reinstated because the Court of Appeals agreed with the District Court that the termination of their employment was racially discriminatory; indeed, the law is settled in the Sixth Circuit that schoolteachers have no general due process rights, as the majority of the court below recognized.[4]

Thus there is no conflict among circuits on the issues actually decided below,[5] nor will this case be affected by

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[4] "The facts of this case distinguish it from *Orr* v. *Trinter*, 444 F.2d 128 (6th Cir. 1971), where this court held that a probationary teacher of one year's service did not have a due process right to a hearing and a statement of reasons for nonrehire. In *Orr*, however, the court clearly recognized that race discrimination was a constitutionally impermissible reason for failure to rehire even a one-year probationary employee. *Orr* v. *Trinter*, supra at 134." (455 F.2d at 201, Ptn. App. A-4).

[5] *Orr* v. *Trinter*, *supra* n.4, does conflict with decisions of the First, Fifth and Seventh Circuits, and a petition for certiorari to review *Orr* is presently pending in this Court, No. 71-819.

the determination of cases already before this Court to which reference was made in the Petition.[6] This case is therefore an entirely inappropriate vehicle for the inquiry suggested by the Board in its Petition.

II.

The Courts Below Concluded That Respondents Had Been Discharged As A Result Of Racial Discrimination By Applying Well Settled Legal Principles To The Facts.

Again contrary to the assertions of the Petition, the Court of Appeals did not forbid school boards from considering the competence or teaching ability of its faculty in determining whether or not to rehire individual teachers; instead, the court applied to the facts of this case, settled law developed by the federal courts since *Brown* v. *Board of Educ.*, 349 U.S. 294 (1955) for the purpose of insuring that reductions in force brought about by desegregation are not carried out in a racially discriminatory fashion.

Consistent with the policy announced in *Brown* of relying upon the lower federal judiciary to elucidate and remedy the many difficult problems associated with the process of school desegregation, see *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6, 14 (1971), a consistent body of legal principles has been developed and applied to situations of faculty reduction occasioned by desegregation.[7] The general rule is that where the teaching staff

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[6] *Perry* v. *Sindermann*, No. 70-36, *cert. granted*, 403 U.S. 917 (1971), decision below, 430 F.2d 939 (5th Cir. 1970); *State College Bd. of Regents* v. *Roth*, No. 71-162, *cert. granted*, 404 U.S. 909 (1971), decision below, 446 F.2d 806 (7th Cir. 1971).

[7] *E.g.*, *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970); *North Carolina Teachers Ass'n* v.

must be reduced because of operating economies or other factors connected with desegregation, those to be discharged must be selected by comparing all teachers according to definite and objective criteria. See *Rolfe* v. *County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968). A corollary principle is that the process of comparison must examine the performance of all teachers in each category as to which the performance of any is considered. Thus, for example, reports of tardiness are insufficient justification for selecting a particular teacher to be discharged during a reduction in force where the punctuality and attendance records of all teachers are not compared.

It is for this reason that past pecadilloes or inadequacies, which were never before viewed as warranting termination, may not, standing alone, justify termination of black teachers in connection with desegregation-related reductions in force. Other Courts of Appeals have also specifically applied this principle. *E.g., Jackson* v. *Wheatley School Dist. No. 28, supra,* 430 F.2d at 1363;[8] *Sparks* v. *Griffin,* No. 71-2747 (5th Cir., May 16, 1972) (slip op. at p. 19).[9]

Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968); *Jackson* v. *Wheatley School Dist. No. 28*, 430 F.2d 1359 (8th Cir. 1970); *Hatton* v. *County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970).

[8] "Defendants offered some vague and inconclusive evidence to the effect that the school officials had over the years received some complaints . . . Each of these plaintiffs had valid certificates to teach and served in such capacity in [the black school] for eleven years. It would appear that if the complaints were not such as to require action against the plaintiffs while they were serving in the Negro school, the complaints would not constitute a valid basis for refusal of employment in the integrated school. Moreover, plaintiffs were not advised that [the complaints] were a factor in their release and they were given no opportunity to meet such charge."

[9] ". . . We reject as clearly erroneous the district court's findings that the district's board voted not to renew the contracts of the plaintiffs-appellants for the 1968-1969 academic year on the basis of non-racial, objective, and reasonable criteria. It is undisputed

Likewise, courts have limited to designated criteria, the factors which school boards may in the future consider whenever reductions in force are necessitated by desegregation. *E.g., Smith* v. *Concorida Parish School Bd.*, 445 F.2d 285 (5th Cir. 1971); *United States* v. *Texas Education Agency*, No. 71-3135 (5th Cir., May 10, 1972). And all of the Courts of Appeals which have considered the issue have agreed that faculty members displaced by a reduction in force may not be relegated to the status of new applicants, but must be afforded preference in filling subsequent vacancies. *E.g., Rolfe* v. *County Bd. of Educ.*, 391 F.2d 77, 80-81 (6th Cir. 1968); *North Carolina Teachers Ass'n* v. *Asheboro City Bd. of Educ.*, 393 F.2d 736, 744 (4th Cir. 1968); *Clark* v. *Board of Educ. of Little Rock*, 369 F.2d 736, 744 (8th Cir. 1966); *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969). The Board's failure to afford Respondents such a preference justifies the District Court's order without regard to the lower court's finding as to the lack of impartiality in the selection process.

In sum, all of the matters about which the Board complains in its Petition are governed by principles of law well settled in all the Courts of Appeals,[10] and review is not warranted herein.

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that the administration of the Union Hill Independent School District tolerated the alleged shortcomings in the performances of the plaintiffs-appellants for extended periods of time but drew the line only when true desegregation of the district was about to become a reality."

[10] The dissent of Judge Weick below is grounded upon a misconstruction of the District Court's order identical to the Board's; the lower court's ruling does not require "the hiring of a teacher who may not be competent to teach" (Ptn. App. A-11) but only that incompetence be established as provided under Tennessee law rather than being presumed and veiled behind federal court desegregation decrees. See Ptn. App. A-25.

III.

The Rulings Below That The School Board Was Not Entitled To Demand A Jury Trial Are Plainly Right And Do Not Conflict With Applicable Decisions Of This Court.

The Board claims a Seventh Amendment right to demand a jury trial in this action brought pursuant to 42 U.S.C. §1983 to redress constitutional deprivations, and also that the ruling below conflicts with *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962). The short answer to these contentions is that the right of jury trial exists only as to causes of action in which it was available at the time the Amendment was adopted. Where, as here, the litigation is brought pursuant to express statutory authorization, and was unknown at common law, there is no constitutional right to a jury. *United States* v. *Louisiana*, 339 U.S. 699, 706 (1950); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

The issue was last presented to this Court in a petition for review from the decision in *Harkless* v. *Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). There, the Court of Appeals for the Fifth Circuit, in a teacher discharge case like this one, expressly held there was no right to jury trial, and reaffirmed its view, earlier expressed, that *NLRB* v. *Jones & Laughlin Steel Corp., supra*, was unaffected by the *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) and *Dairy Queen* cases relied upon by this School Board. The court noted that the Fifth Circuit had "rejected the view '. . . that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by a jury.' *Swofford* v. *B&W, Inc.*, 5 Cir., 1964, 336 F.2d 406, 414." *Harkless* v. *Sweeny Inde-*

pendent School Dist., supra, 427 F.2d at 324. The Fourth Circuit reached a similar result in an action involving the reinstatement of nurses who had been the victims of racial discrimination. *Smith* v. *Hampton Training School,* 360 F.2d 577, 581 (4th Cir. 1966).

Each of these cases characterized the back pay-money demand as "incidental" to the subject matter of the claim—the vindication, pursuant to 42 U.S.C. §1983, of constitutional rights.[11] This is quite different, however, from the sense in which litigants have sought to characterize independent legal and equitable claims, joined together in a single lawsuit, as "incidental" to one another in order to promote or defeat the right to jury trial. *Beacon Theatres, Dairy Queen,* and other decisions of this Court make absolutely clear that where the subject matter of a lawsuit includes a legal claim cognizable to be tried before a jury when the Seventh Amendment was adopted, the right to jury trial is absolute.

On the other hand, the rationale of *NLRB* v. *Jones & Laughlin Steel Corp., supra*: that there is no jury trial right applicable to statutorily created actions, is not affected by the *Beacon Theatres* cases and has been applied by this Court and the lower federal courts. *E.g., Porter* v. *Warner Co.,* 328 U.S. 395 (1946) (Emergency Price Control Act of 1942); *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288 (1960) (Fair Labor Standards Act); *Brady* v. *Trans*

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[11] One of the latest jury trial right cases from this Court, *Ross* v. *Bernhard,* 396 U.S. 531 (1970), indicates that the availability of a jury depends upon the nature of the underlying claim. There, plaintiffs in a stockholder's derivative action were allowed to demand a jury trial not simply because "[t]he relief sought is money damages" but because there were "allegations [in the complaint] of ordinary breach of contract and gross negligence," traditional legal claims entitling the parties to a jury trial. 396 U.S. at 542.

World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961) (Railway Labor Act); *Conrocode* v. *Ohio Bell Tel. Co.*, 11 F.R.D. 303 (N.D. Ohio 1951) (Selective Training and Service Act); *McGraw* v. *United Ass'n of Journeymen, etc.*, 341 F.2d 705 (6th Cir. 1965) (Landrum-Griffin Act); *King* v. *Laborers Int'l Union*, 443 F.2d 273 (6th Cir. 1971) (*dictum*), and cases cited therein (Title VII, Civil Rights Act of 1964).

Finally, we suggest that in any event, the issue is not significant enough to warrant review by this Court. In 1972, the Congress amended Title VII of the Civil Rights Act of 1964 (dealing with discrimination in employment) so as to include within the Act's coverage, for the first time, employees of state and local governmental bodies—including teachers. 1972 U.S. Code Cong. & Adm. News 814. Since most future claims of discriminatory teacher discharge will probably be brought under Title VII, as to which it has been consistently held that there is no jury trial right, *e.g.*, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *King* v. *Laborers Int'l Union*, *supra*, this issue is likely to become academic.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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